Statement of

The Honorable Edward Kennedy

United States Senator
Massachusetts
June 9, 2005

Statement of Senator Edward M. Kennedy
on the Nomination of Terrence Boyle
to the U.S. Court of Appeals for the Fourth Circuit

Terrence Boyle has been nominated to a life-time position on the U.S. Court of Appeals for the Fourth Circuit --- one of the most important federal courts in the nation. It often has the last word on laws affecting the daily lives of persons in its region.

The Fourth Circuit has also become the Administration's forum of choice for cases testing the limits of civil liberties in this post-September 11 era. By choosing to hold certain detainees within the Circuit's jurisdiction, the Administration has ensured in several cases that this court would decide the outcome. This was true in the cases of Yaser Hamdi, and Jose Padilla, American citizens whom the government sought to hold indefinitely without access to counsel or judicial review. The Moussaoui case will be tried in the Fourth Circuit, and aspects of it have already been considered there. Although the Supreme Court eventually reviewed the Hamdi case, it hears so few cases, that as a practical matter, the Fourth Circuit has the final word on many vital legal issues.

The Fourth Circuit also has the highest African American population of any circuit and a rapidly increasing Latino population. As a result, it frequently decides cases affecting the civil rights of minorities.

It is also widely recognized as the nation's most conservative circuit court, and in recent years, it has taken a sharp turn to the right. Again and again, its decisions have shut the door on meritorious claims for civil rights and criminal justice.

In especially flagrant cases, the Supreme Court has stepped in. It overruled the Fourth Circuit's decision that states can't outlaw cross-burning as a form of racial intimidation. It held that the Fourth Circuit was wrong to rule that federal law enforcement officials need not follow the Miranda decision requiring them to inform suspects of their right to counsel. It held that the Fourth Circuit was wrong when it upheld drug testing for pregnant women without their consent.

The last thing the Fourth Circuit needs is a judge who will decide cases based on ideology instead of the law. But that's exactly what the President is suggesting by nominating Judge Boyle. As all of us are well aware, Democrats have cooperated to confirm 210 of President Bush's judicial nominees.
In fact, Judge Boyle's nomination isn't even ripe to be listed on today's agenda, because he failed to fully comply with requests by the Committee to review his unpublished opinions, particularly those involving claims of basic constitutional rights and civil rights. The American people have a right to know Judge Boyle's record before he is promoted to a life-time position on the federal court of appeals. They have a right to know how he has ruled on issues important to their everyday lives.

Judge Boyle indicated months ago during his hearing that all of his unpublished opinions are a "matter of public record," and that he'd "be more than happy" to provide them.

But we've received opinions covering less than half of Judge Boyle's tenure on the bench; we received civil opinions dating back only to 1997 and criminal opinions back to 1992. But Judge Boyle was confirmed in 1984. So the materials we received leave more than a decade of his record unaccounted for - more than half the time that Judge Boyle has been on the bench.

In an attempt to move things along - I identified for Judge Boyle the areas that we'd need to review first - such as unpublished opinions that have been reversed or criticized on appeal, and those involving basic constitutional and civil rights. We need to receive these opinions, and to consider this nomination based on the entire record, not half a record. His failure to fulfill this simple request shows disrespect for the Committee and for the American people's right to know his record.

Based on the record before us, it seems that Judge Boyle is an example of a nominee chosen for his radical views, not his qualifications. The Committee should admit that fact and send the White House a clear message that the American people deserve better. Try as they might, Judge Boyle's supporters cannot explain away his unacceptably high reversal rate. His decisions have been reversed or criticized on appeal more than 150 times, far more than any other district judge nominated to a circuit court by President Bush. Too often, these reversals took place because he made the same mistake more than once.

Time and again, the Fourth Circuit has reversed him for committing "plain error." According to the Circuit, that means error so severe and obvious that it goes to the heart of the "fairness, integrity, or public reputation" of court proceedings. It's one thing for a judge to be overruled on legal issues that are a close call, or that have never been addressed by the court of appeals. It's quite another to be reversed over and over, as Judge Boyle has, for ignoring clear legal precedent.

His decisions in civil cases show a pattern of too
quickly dismissing plaintiffs' claims without giving them their day in court. He's been reversed numerous times for that reason, particularly in cases involving claims of individual rights. He has been reversed at least three times for failing to give parties proper notice and a chance to respond before granting summary judgment against them, as is clearly required under the Federal Rules of Civil Procedure.

In one case, the Fourth Circuit overruled him for granting summary judgment to the defendant without ever considering the plaintiff's objections. Less than a year later, he made the same basic error in another case, and the Fourth Circuit reversed him again on the same ground. This Committee should not confirm a judge who repeatedly makes such fundamental legal errors.

More troubling still, he has been reversed most often, and has made the most serious mistakes, in the cases that matter most to citizens' daily lives. Time and again, the conservative Fourth Circuit has ruled that Judge Boyle improperly dismissed cases seeking protection for important individual rights, such as the right to free speech, free association, the right to be free from discrimination, and even the right to a fair and lawful sentence in a criminal case.

In Edwards v. City of Goldsboro, he improperly dismissed the First Amendment claims of a police officer, Sergeant Kenneth Edwards, who had been suspended for teaching courses on concealed handgun safety. The Fourth Circuit held that Judge Boyle abused his discretion by failing to allow Sergeant Edwards to amend his complaint before dismissing the case. As the Fourth Circuit noted, the Federal Rules of Civil Procedure clearly require that permission to amend a complaint "shall be freely given when justice so requires." The Fourth Circuit ruled that Judge Boyle ignored "well settled" law that permission to amend a complaint can be denied only if it would be futile, is requested in bad faith, or would result in prejudice to the defendant. It's difficult to understand how Judge Boyle could be unaware of this basic requirement and its "well settled" interpretation.
I'm particularly troubled by Judge Boyle's decisions wrongly interpreting the Americans with Disabilities Act, the landmark law to ensure that the disabled have genuine access to the American dream. Judge Boyle has repeatedly struck down or mis-interpreted important parts of the Act. He ruled in two cases that all of Title II is invalid. In one of these cases, disabled persons challenged fees for the use of handicapped parking spaces. But Judge Boyle dismissed the case, declaring that although Congress had attempted to invoke powers under the Fourteenth Amendment, it had no authority to do so to advance the goals of the ADA. In the other case, he held that Title II is

unconstitutional as applied to state prisons, saying that "[u]nlike traditional anti-discrimination laws, the ADA demands entitlement in order to achieve its goals. This the Fourteenth Amendment cannot authorize."

In my written questions to Judge Boyle, I asked how he could possibly justify these decisions in light of the Supreme Court's holding that Title II is "unquestionably" valid Fourteenth Amendment legislation as applied to cases involving access to courts and judicial services. His answer was frankly incomprehensible. He stated that his analysis had been adopted by the Supreme Court in Garret v. Alabama. But the Garrett Court had been addressing an entirely different part of the ADA - Title I -- which forbids discrimination in employment. The Garrett decision had nothing to do with the case before Judge Boyle, which involved Title II, the part of the Act prohibiting discrimination in public services and state and local government programs.

As the distinguished Duke University law professor and former ADA litigator, Erwin Chemerinsky, noted in a recent letter to this Committee, Judge Boyle's explanation is simply inaccurate. There is no way to reconcile Judge Boyle's decisions that Congress lacked power to enact Title II, with the Supreme Court's holding that Congress "unquestionably" had the power to do so, based on the long history of discrimination in state and local government programs. His answers cannot hide that fact. I can only conclude that Judge Boyle either does not understand the law, or is seeking to obscure the issue.
I am also concerned by Judge Boyle's decision in another case, in which he clearly mis-interpreted the ADA's plain language. When Congress passed the ADA, we specifically listed examples of reasonable accommodations under the Act, including reassignment of an employee with a disability to a vacant position. But in this case, Judge Boyle ruled just the opposite of what the law says, concluding that reassigning a disabled worker to another, vacant position is never a reasonable accommodation.

He tried to explain away the ADA's clear language that specifically identified "reassignment to a vacant position," as an example of a reasonable accommodation. He held that these plain words in the law were "merely suggestive" and have "no force of law."

Although the Fourth Circuit upheld his grant of summary judgment on other grounds, it made absolutely clear that he was wrong in holding that the examples of reasonable accommodation listed in the statute don't have the force of law. As the court of appeals stated, "[o]bviously, Congress considered these types of accommodations to be reasonable." Judge Boyle's willingness to ignore clear statutory language calls into doubt his willingness to enforce the law as written.

Equally disturbing is Judge Boyle's insistence, in the same case, that courts should not "second guess" an employer about whether an accommodation is reasonable, and should defer to employers on the issue. The conservative Fourth Circuit also criticized this part of his opinion, explaining that it's the court's job to decide if an accommodation is reasonable, rather than simply taking the employer's word. This Committee must ensure that nominees will give fair treatment to disabled persons who seek the protection of the law.

These aspects of Judge Boyle's record on disability rights are disturbing enough, because they show a clear disregard for the ADA. Worse still are his repeated comments showing hostility to the Act's reasonable accommodation requirements because, he feels, they grant special privileges to the disabled. He has stated that the ADA "seeks to single out the disabled for special, advantageous treatment," and that the Act grants "special treatment tailored to the claimed disability."

For a person who needs a wheelchair ramp to go through the courthouse door, or a deaf child who needs assistance in the classroom, denying an accommodation means an inability to obtain justice or to learn. Without taking into account the particular needs and circumstances of persons with disabilities, there is no way to ensure they have an equal opportunity. Judge Boyle's views would severely limit participation by these groups in our society.

The rest of Judge Boyle's civil rights record is equally unacceptable. He was unanimously reversed by the Supreme Court in a voting rights case, in which white voters challenged a Congressional district with a substantial African American population, claiming it had been unconstitutionally drawn up for racial reasons. The issue was whether the white voters could prove that the lines had been drawn for racial rather than political reasons. Judge Boyle granted summary judgment for the plaintiffs before the parties could gather evidence in discovery and without holding a trial.

Writing for a unanimous Supreme Court, Justice Thomas held that Judge Boyle had failed to follow the basic legal standard governing summary judgment motions. It held he was wrong to decide, without even holding a trial, that a Congressional district with a significant African American population necessarily resulted from an improper racial gerrymander.

The Supreme Court later reversed Judge Boyle a second time in the same case. In reviewing his second opinion, the Court stated that his decision was "clearly erroneous" and that he improperly relied on "precisely the kind of evidence [the Court] said was inadequate the last time . . . ."

Judge Boyle has also failed to adequately explain his serious mis-statements of law in a gender discrimination case. He refused to enter a consent decree agreed to by the Justice Department and the State of North Carolina to resolve an alleged pattern or practice of discrimination against women in hiring and promoting prison guards. The Justice Department identified over 600 women who had been harmed by the discriminatory practices.

Judge Boyle refused to enter the decree. Instead, he encouraged the State to withdraw from its binding contract, and ruled that his court lacked jurisdiction over the case. On appeal, the Fourth Circuit unanimously held that his decision was an "abuse of discretion" and ordered him to enter the consent decree.

In the same case, Judge Boyle also went out of his way to criticize the Department of Justice for including evidence that North Carolina hired significantly fewer female prison guards than other states. He wrote that "nothing is more offensive to the idea of federalism than the notion that the federal government will punish a state for having a non-conforming culture -- for being different than the other states." Although Judge Boyle has stated that he was not suggesting a cultural defense to discrimination, his words speak for themselves. There was no valid reason for including this statement in his opinion. At best it's irrelevant, and at worst it shows open hostility to the principle of basic equality under the law.

In the same opinion, Judge Boyle also clearly mis-interpreted the 1991 Civil Rights Act. He stated that under the Act, proof of discriminatory intent is always required in a disparate impact case. In fact, the opposite is true. I was the principle author of the 1991 Act, and one of our main purposes in enacting its provisions was to allow plaintiffs to prove discrimination by looking at the effects of practices, not just their intent. That change amended Title VII to include the kind of disparate impact analysis that the Supreme Court recognized in Griggs v. Duke Power, when it held that supposedly neutral employment practices cannot be allowed to act as "built in head winds" limiting employment opportunities for any group. I'm troubled that Judge Boyle so seriously mis-read this important civil rights law.

In addition to these serious problems in his civil rights record, Judge Boyle has also made repeated errors on criminal law. The Fourth Circuit has repeatedly reversed his decisions in criminal cases, often for making the same, clear error more than once.

In several criminal cases, the Fourth Circuit held that Judge Boyle committed "plain error." He was twice reversed for wrongly allowing a criminal suspect to go free.

He was reversed for committing plain error by allowing the government to violate a plea agreement. He was also reversed for plain error for mistakes in impaneling a jury. And he's been reversed for plain error in several sentencing cases. The list goes on and on.

Judge Boyle's record has generated widespread concern from citizens in the Fourth Circuit, including his home state of North Carolina. He's strongly opposed by law enforcement and other public servants, including the Southern States Police Benevolent Association, the Police Benevolent Societies in North and South Carolina, the Professional Fire Fighters and Paramedics of North Carolina, and the North Carolina Troopers Association.

The Director of the North Carolina Police Benevolent Society wrote that "[o]ur officers have appeared before Judge Boyle as parties and witnesses. We know Judge Boyle and his long judicial record. Our members have personally suffered from [his] repeated legal errors." We've also heard from organizations dedicated to disability rights, other civil rights, and workers' rights opposing this nomination, including many in North Carolina.

We certainly expect President Bush to nominate judges who are Republicans and conservatives. But we really need judges with the highest legal qualifications and a record of excellence in the law. We need judges who will decide cases with an open mind and a commitment to fairness for all, not judges who believe they are free to ignore the law. Judge Boyle's record fails this basic test.

Finally, some of Judge Boyle's supporters make the preposterous claim that opposition to his nomination is somehow opposition to faith. Nothing could be farther from the truth. Each of us as Senators -- Republicans and Democrats alike -- has taken an oath of office to uphold the Constitution, including the fundamental principle of the separation of church and state. Freedom of religion flourishes in America because neither Congress, the Administration, nor the courts has the power to impose their own religious views on the nation or any of its citizens.

I do not question Judge Boyle's faith, and none of us who oppose his nomination do so either. But we do question his qualifications for this high judicial position. His record is appalling, and I urge my colleagues to reject it.